

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANTHONY ARTHUR BUSH,

Petitioner,

v.

CHERYL K. PLILER, Warden, ET AL.

Respondents.

Civil No. 01CV0142-J (NLS)

**ORDER GRANTING
PETITIONER'S REQUEST FOR
CERTIFICATE OF
APPEALABILITY**

Petitioner originally filed a petition for writ of habeas corpus with this Court pursuant to 28 U.S.C. § 2254 in January 2001. [Doc. No. 1.] Subsequently, in November 2002, the Court issued an order denying the petition and granting a certificate of appealability. [Doc. No. 32.] On August 18, 2008, the Ninth Circuit issued a mandate reversing in part and affirming in part this Court's order and remanding "so that the district court may hold a hearing to give the prosecutor a chance to offer a race-neutral explanation and so that the district court may determine whether the prosecutor violated *Batson*." [Doc. No. 68.] On December 1, 2008, the Court held an evidentiary hearing to consider Petitioner's challenge under *Batson v. Kentucky*, 476 U.S. 79 (1986), and the Court subsequently denied the petition. [Doc. No. 90.] Petitioner now seeks a certificate of appealability pursuant to 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b). [Doc. No. 92.] For the reasons set forth below, the Court **GRANTS** Petitioner's Request for a Certificate of Appealability.

Legal Standard

A state prisoner may not appeal the denial of a section 2254 habeas petition unless he obtains a certificate of appealability from a district or circuit judge. 28 U.S.C. § 2253 (c)(1)(A); *see also United States v. Asrar*, 116 F.3d 1268, 1269-70 (9th Cir. 1997) (holding that district courts retain authority to issue certificates of appealability under AEDPA). In deciding whether to grant a certificate of appealability, a court must either indicate the specific issues supporting a certificate or state reasons why a certificate is not warranted. *See id.* at 1270. A certificate of appealability is authorized “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this standard, Petitioner must show that: (1) the issues are debatable among jurists of reason; (2) a court could resolve the issues in a different manner; or (3) the questions are adequate to deserve encouragement to proceed further. *Lambright v. Stewart*, 220 F.3d 1022, 1024-25 (9th Cir. 2000) (*citing Slack v. McDaniel*, 529 U.S. 473 (2000)); *Barefoot v. Estelle*, 463 U.S. 880 (1983). Petitioner does not have to show “that he should prevail on the merits. He has already failed in that endeavor.” *Lambright*, 220 F.3d at 1025 (citing *Barefoot*, 463 U.S. at 893 n.4).

Discussion

Petitioner asks the Court to grant him a certificate of appealability on two issues: whether the prosecutor offered a sufficient race-neutral reason for striking prospective juror Howard; and whether the reasons given by the prosecutor were pretextual.

At the evidentiary hearing in this case, the prosecutor in Petitioner’s criminal trial gave several reasons for striking prospective juror Howard, but she also testified that, prior to reading the voir dire transcript, she had no independent recollection of Mr. Howard or her reasons for dismissing him from the juror pool. (Evidentiary Hr’g Tr. at 27-28.) Moreover, she agreed that her “ideas about why [she] might have stricken Mr. Howard . . . are based not the particularities of this case, but sort of on [her] general voir dire approach . . . during the dozens of felony cases that [she] tried.” (*Id.* at 28.) The Ninth Circuit has held that “where the state has *not* put forward an actual reason, ‘such a failure, or in this case an assertion of bad memory, is evidence of discrimination.’” *Paulino v. Harrison (Paulino II)*, 542 F.3d 692, 702 (9th Cir. 2008) (citing

1 *Yee v. Duncan*, 463 F.3d 893, 900 (9th Cir. 2006). In the same case, the Ninth Circuit declined
 2 to decide whether a prosecutor's testimony about her "general principles of jury selection" could
 3 satisfy the state's burden under *Batson*. *Id.* at 701, 701 n.10. As a result, reasonable jurists
 4 could disagree about whether the prosecutor's testimony at the evidentiary hearing in this case
 5 was sufficient.

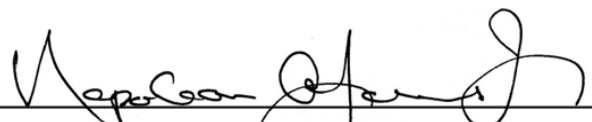
6 In its most recent order denying Petitioner a writ of habeas corpus, the Court found that
 7 the race-neutral reasons offered by the prosecutor at the evidentiary hearing—Mr. Howard's work
 8 schedule, his exposure to publicity about the trial, and his knowledge of gangs—were not
 9 pretextual. Petitioner argues that, with respect to the first two reasons, Mr. Howard was not very
 10 different from many other jurors who have a work schedule that is not nine-to-five or who could
 11 "avoid publicity by closing a paper or turning a tv channel." In addition, the prosecutor
 12 questioned Mr. Howard extensively about his knowledge of gangs but did not similarly question
 13 a white juror who also likely had such knowledge. Although the Court found that the different
 14 treatment was justified given the record, reasonable jurists could disagree about whether the
 15 reasons given by the prosecutor were pretextual.

16 *Conclusion*

17 Based on the foregoing, the Court **GRANTS** Petitioner's request for a certificate of
 18 appealability on the issues of whether the prosecutor gave a sufficient race-neutral reason for
 19 striking prospective juror Howard, and whether the reasons given by the prosecutor were
 20 pretextual.

21 **IT IS SO ORDERED.**

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 23 DATED: March 20, 2009

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 25 HON. NAPOLEON A. JONES, JR.
 26 United States District Judge

27 cc: Magistrate Judge Stormes
 28 All Counsel of Record